In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 934

HUGH BRYSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-ii) is reported at 403 F. 2d 340. The opinion of the district court (Pet. App. iii-xx) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1968. The petition for a writ of certiorari was filed on January 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to collateral relief from his 1955 conviction under 18 U.S.C. 1001, for making a false statement in an affidavit submitted under former Section 9(h) of the Taft-Hartley Act, on the ground that Section 9(h) was unconstitutional.

STATEMENT

In 1955, a jury in the United States District Court for the Northern District of California found petitioner guilty of violating 18 U.S.C. 1001 by filing an affidavit with the National Labor Relations Board falsely averring that he was not affiliated with the Communist Party. At that time, Section 9(h) of the Taft-Hartley Act, 29 U.S.C. (1952 ed.), 159(h), made the services of the Board unavailable to a union unless each of its officers had filed an affidavit declaring that he was not a member of or affiliated with the Communist Party.[1] Although the constitutionality of Section 9(h) had been upheld in *American Communications Association* v. *Douds*, 339 U.S. 382, petitioner sought, unsuccessfully, to defend his conduct by attacking the validity of this underlying statute. *Bryson* v. *United States*, 238 F. 2d 657, rehearing

[1] In 1959 Section 9(h) was repealed, and Section 504 of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504) was enacted, making it a crime for any person who had been a member of the Communist Party within five years to be a union officer. Section 504 was held to be unconstitutional as a bill of attainder in *United States* v. *Brown*, 381 U.S. 437.

denied, 243 F. 2d 837 (C.A. 9), certiorari denied, 355 U.S. 817.[2]

In the present proceeding petitioner is again attacking the constitutionality of Section 9(h) in an effort to have his conviction vacated and the unpaid portion of his fine remitted. The district court granted his motion, holding that Section 9(h) was unconstitutional. The court of appeals, however, reversed per curiam, relying on this Court's recent decision in *Dennis* v. *United States*, 384 U.S. 855; since petitioner had been convicted of fraudulently seeking to evade the requirements of Section 9(h), the court held that he lacked standing to challenge its constitutionality.

ARGUMENT

The court below correctly determined that this case is not materially distinguishable from *Dennis*, and thus that petitioner will not be heard to impugn the validity of the statute (Section 9(h)) whose requirements he knowingly and willfully sought to evade by fraudulent misrepresentation. As this Court explained in *Dennis*, 384 U.S. at 867: "One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional."

Petitioner seeks to avoid the impact of the settled rule applied in *Dennis* by arguing (Pet. 12-15) that his personal culpability was less egregious than that

[2] A subsequent motion for reduction of sentence was also denied. See *Bryson* v. *United States*, 265 F. 2d 9 (C.A. 9), certiorari denied, 360 U.S. 919.

of the members of the "conspiracy, cynical and fraudulent," involved in that case. To be sure, the charge in *Dennis* was under the general conspiracy statute (18 U.S.C. 371) and not under the false-statement statute (18 U.S.C. 1001), as here. The reason was, evidently, that in *Dennis* the prosecution was against non-signing co-conspirators as well as those who signed the false affidavits (see 384 U.S. at 860). But the governing principle applies here as much as in *Dennis*: "that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit" (384 U.S. at 867). Petitioner, like some of the *Dennis* defendants, filed a false affidavit under Section 9(h) in order to secure for his union, as well as for himself, the advantages of access to the facilities of the Labor Board (*Leedom* v. *International Union*, 352 U.S. 145). Petitioner's offense involves no less culpable an intent "to circumvent the statute" (*Dennis*, 384 U.S. at 865) than does the offense of conspiring to make such false affidavits; indeed, each offense is subject to the same penalty.

Thus here, as in *Dennis*, the validity of the conviction under another statute does not turn upon the constitutionality of Section 9(h). The jury at petitioner's trial settled long ago that his affidavit was a "knowing and willfull" falsification in a matter within the jurisdiction of the Labor Board, and accordingly petitioner was properly convicted under 18 U.S.C. 1001.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 332912 478